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-- REMARKS --

The objection to the drawings

The objection to the drawings is traversed. The Examiner cites an incorrect legal standard for the drawings. 37 C.F.R. 1.81(a) only requires:

The applicant for a patent is required to furnish a drawing of his or her invention where necessary for the understanding of the subject matter sought to be patented; this drawing, or a high quality copy thereof, must be filed with the application.

Each and every feature of the claimed invention is in fact depicted in the drawings. Those of ordinary skill in the art are well able to determine the nature of the claimed invention based on the claim and the figures. The Examiner fails to cite any authority to support the contention that the figure must show only the claimed elements -- the only citation requires that all (but not only) the claimed elements be illustrated.

Additionally, the Examiner's allegation that the "padding material" needs to be illustrated is specious -- any person of ordinary skill in the art would understand the subject matter with or without any padding material "illustrated" in a patent figure. Furthermore, the Examiner is respectfully directed to FIG. 1A, where padding material 114 is illustrated. If the Examiner intends to seriously contend that one of ordinary skill in the art requires a depiction of "padding material" to understand the invention, Applicant traverses any such requirement unless and until the Examiner provides *evidence*, and not just a mere allegation, supporting such a dim view of the skills of those of ordinary skill in the art. Applicant is incredulous that the Examiner believes the skills of those of ordinary skill in the art are so low. Indeed, Applicant notes that any such evidence would likely destroy the Examiner's obviousness rejections, as further outlined below.

With respect to the Examiner's allegation that an "additional element defining the padding" is required, Applicant reiterates that those of ordinary skill in the art would understand the subject matter sought to be patented. Any continued rejection must be supported by evidence supporting the Examiner's view of the skill level of those of ordinary skill in the art.

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Additionally, the Examiner's citation to 37 CFR §1.83(a) is incomplete. A full reading of that section indicates that "conventional features disclosed in the description and claims, where the detailed illustration is not essential for a proper understanding of the invention, should be illustrated in the drawing in the form of a graphical drawing symbol..." Thus, to maintain this objection, the Examiner must either conclude that an illustration of padding material is "essential for a proper understanding of the invention" and that the illustration does not provide a graphical drawing symbol. Any such conclusion entails the Examiner drawing such a dim view of the level of skill in the art as to require evidence. Applicant is unable to accept the Examiner's dim view.

Withdrawal of the objections to the figures is requested.

The objection to the specification

The objection to the specification has been obviated by capitalizing the spelling of VELCRO. Withdrawal of the objection is requested.

The §112 rejections

The §112 rejection of claims 1 and 11 is traversed.

The subject matter was, in fact, described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor had possession of the claimed invention. Again, Applicant is incredulous that the Examiner has such a dim view of those of ordinary skill in the art, and must insist that the Examiner provide

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evidence and not mere allegation or speculation relating to the level of such skill. In particular, the Examiner is gently pointed to ¶33 of the published application:

[0033] FIG. 1A shows a side view of the portable construction material stand 100. Stand 100 includes a support portion 110 comprising a top section 115, middle section 120, and a bottom section 130. Portable construction material stand 100 further comprises a base portion 150 extending out from support portion, such that support portion 120 extends upward from the base portion 150. In one embodiment of the stand, bottom section 130 comprises a hole for attaching base portion 150 to support portion 110. In another embodiment of the portable material stand, bottom section 130 comprises a snap attachment, or snap fit, for affixing base portion 150 to support portion 110. In yet another embodiment of the portable material stand, bottom section 130 comprises means for attaching base portion 150 to support portion 130. In yet another embodiment of the invention, base portion 150 and support portion 110 are formed as a unitary member.

Applicant thanks the Examiner for the reminder of the differences between claim language reciting “comprising” and “consisting of”. Applicant’s counsel has indeed read MPEP §2111.03, and understands the differences between “comprising” and “consisting of”. With respect to the examiner’s recitation that a claims depending from a “consisting of” claim cannot add elements or steps, Applicant notes that none of claims 4-7, 9, 10, 14-17, and 19-23 add elements or steps. Rather, each of claims 4-7, 9, 10, 14-17, and 19-23 simply modify the “consisting of” elements and are therefore proper.

The §112 ¶1 rejection of claims 1, 3-10, 11 and 13-22 is traversed. There is no contradiction between the cited specification language and the claim language. The claim language is quite clear and unambiguous. §112 requires only that the claims set out and circumscribe the invention with a reasonable degree of precision and particularity. See, MPEP §2106. A claim requiring a base portion formed as a unitary member, and a support portion formed as a unitary member extending upward from the base portion and attached to the base portion, the support portion including an angled contact surface, wherein when planar construction material is positioned on the base portion and in contact with the contact surface, the stand maintains the material in a stationary position sets out and circumscribe the invention with a reasonable degree of precision and particularity, in compliance with §112 ¶2. Indeed, the specification

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conforms with the claimed language by noting that in one embodiment (i.e. the currently claimed embodiment), the base portion and support portion are formed as a unitary member.

Claims 3 and 13 do not inherit any §112 ¶2 problems, as the claim correctly and accurately requires the unitary member portions to snap fit together. Additionally, the remaining dependent claims do not, therefore, inherit any §112 ¶ problems.

Claims 21 and 22 have been amended to correct the omission of the letter "d" from "flanged". This amendment is made solely to correct a typographical error, and should not generate the need for a new search. Indeed, Applicant notes that the Examiner seems to understand the claim based on his notation that claims 4 and 14 recite the flanged portion.

Applicant requests withdrawal of the §112 ¶1, 2 rejections to claims 1, 3-10, 11 and 13-22

The §103(a) rejection over Crowell

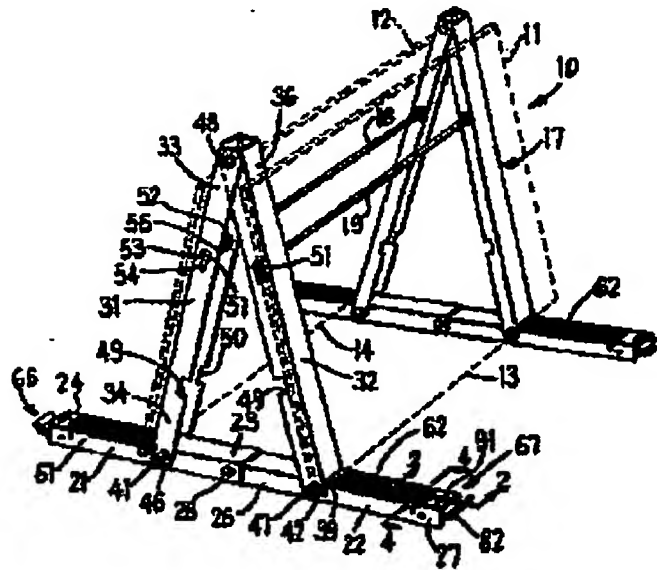
The §103(a) rejections of claims 1, 3-8, 10, 11, 13-18, and 20-22 as unpatentable over Crowell are traversed. In order to maintain this rejection, each and every element of the claims must be taught or suggested by the reference.

First, the Examiner's own rejection misstates the claim by arguing that Crowell discloses a portable construction stand comprising.... Given the Examiner's much appreciated lesson in the distinctions between "comprising" and "consisting of" provided in the Examiner's §112 rejection, the Examiner appears to be well aware of the distinction.

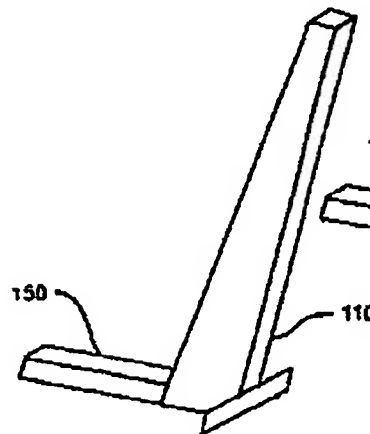
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Even a cursory review of Crowell's stand illustrates that Crowell's stand includes elements other than as claimed. See below:



as compared to the instant invention (FIG. 2 of the application):



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Furthermore, the mere fact that Crowell could be modified to entirely remove a portion of the support is utterly and entirely irrelevant. The mere fact that the reference *can* be modified to obtain the claimed invention does *not* render the resultant modification obvious *unless the prior art also suggests the desirability of the combination*. See, *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990) (Claims were directed to an apparatus for producing an aerated cementitious composition by drawing air into the cementitious composition by driving the output pump at a capacity greater than the feed rate. The prior art reference taught that the feed means can be run at a variable speed, however the court found that this does not require that the output pump be run at the claimed speed so that air is drawn into the mixing chamber and is entrained in the ingredients during operation. Although a prior art device "may be capable of being modified to run the way the apparatus is claimed, there must be a suggestion or motivation in the reference to do so." 916 F.2d at 682, 16 USPQ2d at 1432.). See also *In re Fritch*, 972 F.2d 1260, 23 USPQ2d 1780 (Fed. Cir. 1992) (flexible landscape edging device which is conformable to a ground surface of varying slope not suggested by combination of prior art references).

Here, Crowell specifically teaches that the support "includes *two* identical end support assemblies, *each* having *two* base members pivotally coupled at first ends and *two* legs which are pivotally coupled to each other...." See, abstract, Crowell (emphasis added). The Examiner's proposed modification would destroy such a teaching as the claims require a "unitary member".

Additionally, Crowell teaches that one of its objects is "to provide stable and dependable support" (col. 1, lines 57-59). By alleging that one of ordinary skill in the art would be motivated to remove a full half of the support, the Examiner is also alleging that one of ordinary skill in the art would expect that removing a full half of the support would result in a stable and dependable support. Yet, simultaneously, the Examiner alleges that this *exact same person* of ordinary skill in the art would be unable to practice the invention without "an additional element defining" the claimed padding material. Again, Applicant must have evidence supporting the Examiner's definition of the level of skill in the art.

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The prior art can be modified or combined to reject claims as *prima facie* obvious as long as there is a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The Examiner is silent as to the basis for any such expectation. Those of skill in the art would not necessarily expect a support which is missing pieces to be sturdy.

Additionally, there can be no motivation to actually make the Examiner's proposed modifications in light of Crowell's failure to denounce its sheeting support as anything less than ideal, or to denounce the use of two base members as less than ideal. This is particularly true in light of Crowell's discussion of the common "A-frame" devices in column 1, lines 27-49. Clearly, an "A-frame" device is different than the illustrated "_ " shape. This is further reinforced by Crowell's teachings that the "sheeting support 10 which embodies the present invention and is used to support one or more sheets of material 11 and 12 *on each side thereof...*" at column 2, lines 64-68, emphasis added.

Additionally, there is no motivation or suggestion to use the Crowell invention without elements 18 and 19, despite the Examiner's allegation. Crowell does not teach that use of elements 18 and 19 is unnecessary, and indeed, Crowell teaches at length about how to operate the device, including extensive instructions on removing and installing rods 18 and 19.

In addition, claim 21 and claim 22 each require a flanged portion attached to the support portion opposite the base portion. No such structure is disclosed or taught by Crowell. At most, the Examiner's citation to an unnumbered "U-shaped element" is disingenuous, as such an element is not a flanged portion. Additionally, such an element is not attached opposite the base portion. At most, the "U-shaped element" is a notch cut out of the support.

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Claims 10 and 20 require that the support portion comprises a telescoping support portion. The Examiner mistakes the folding arms as the telescoping support portion, and cites Webster's for a definition that telescopic means "become forced together lengthwise with one part entering another as the result of collision". Applicant is confused by such a citation, as Webster's Online defines telescopic as:

"Main Entry: tele-scop-ic

Pronunciation: "te-l&-skā-pik

Function: adjective

1 a : of, relating to, or performed with a telescope b : suitable for seeing or magnifying distant objects

2 : seen or discoverable only by a telescope <telescopic stars>

3 : able to discern objects at a distance

4 : having parts that telescope"

A printout of this page is attached as Exhibit A.

Applicant is unable to even determine the veracity of the Examiner's citation and notes that the Examiner's cited definition is in contrast to the common usage of the term. However, as these astronomy definitions are perhaps inapplicable to the instant use of the word, the better definition is found in the specification at page 8 as allowing the support portion to be extended to a variety of heights. Such usage is much more in line with the definitions as understood by those of skill in the art, and proffered for example, by

onelook.com – "parts that slide one within another"

Encarta: consisting of parts that slide one inside another

Wiktionary: capable of being extended or compressed by the use of parts that slide over one another

Bartleby: extensible or compressible by or as if by the sliding of overlapping sections.

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Dictionary.com: Extensible or compressible by or as if by the sliding of overlapping sections

The Examiner cannot assert that the folding arms taught or suggested by Crowell have any resemblance to these definitions of "telescopic", and therefore claims 10 and 20 are patentable over Crowell for at least the same reasons.

The "official notice"

The taking of official notice that Crowell "could be" used without elements 18 and 19 is traversed. In limited circumstances, it is appropriate for an examiner to take official notice of facts not in the record or to rely on "common knowledge" in making a rejection, however such rejections should be judiciously applied. See, MPEP 2144.03. Official notice is unjustified in this case.

Official notice without documentary evidence to support an examiner's conclusion is permissible only in some circumstances. While "official notice" may be relied on, *these circumstances should be rare when an application is under final rejection* or action under 37 CFR 1.113. Official notice unsupported by documentary evidence *should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known.* As noted by the court in *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of facts beyond the record which may be taken by the examiner must be "capable of such instant and unquestionable demonstration as to defy dispute" (citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)).

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In *Ahlert*, the court held that the Board properly took judicial notice that "it is old to adjust intensity of a flame in accordance with the heat requirement." See also *In re Fox*, 471 F.2d 1405, 1407, 176 USPQ 340, 341 (CCPA 1973) (the court took "judicial notice of the fact that tape recorders commonly erase tape automatically when new 'audio information' is recorded on a tape which already has a recording on it"). In appropriate circumstances, it might not be unreasonable to take official notice of the fact that it is desirable to make something faster, cheaper, better, or stronger without the specific support of documentary evidence. Furthermore, it might not be unreasonable for the examiner in a *first* Office action to take official notice of facts by asserting that certain limitations in a dependent claim are old and well known expedients in the art without the support of documentary evidence provided the facts so noticed are of notorious character and serve only to "fill in the gaps" which might exist in the evidentiary showing made by the examiner to support a particular ground of rejection. *In re Zurko*, 258 F.3d 1379, 1385, 59 USPQ2d 1693, 1697 (Fed. Cir. 2001); *Ahlert*, 424 F.2d at 1092, 165 USPQ at 421.

It would *not* be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are *not* capable of instant and unquestionable demonstration as being well-known. For example, assertions of technical facts in the areas of esoteric technology or specific knowledge of the prior art must always be supported by citation to some reference work recognized as standard in the pertinent art. *In re Ahlert*, 424 F.2d at 1091, 165 USPQ at 420-21. See also *In re Grose*, 592 F.2d 1161, 1167-68, 201 USPQ 57, 63 (CCPA 1979) ("[W]hen the PTO seeks to rely upon a chemical theory, in establishing a *prima facie* case of obviousness, it must provide evidentiary support for the existence and meaning of that theory."); *In re Eynde*, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973) ("[W]e reject the notion that judicial or administrative notice may be taken of the state of the art. The facts constituting the state of the art are normally subject to the possibility of rational disagreement among reasonable men and are not amenable to the taking of such notice.").

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Here, the Examiner *cannot conclusively assert* that it is well known that Crowell "could be used without 18 and 19". Any such assertion cannot possibly be construed as of a notorious character, or capable of instant and unquestionable demonstration. In order to adequately traverse the Examiner's statement of official notice, Applicant notes that those of ordinary skill in the art would generally recognize the cross-support features of rods 18 and 19 and would not ordinarily simply use the device without the support rods 18 and 19. This usage of "official notice" does far more than simply "fill in the gaps".

Furthermore, in light of the pivotal coupling at the upper end of the base members (see, Abstract, Crowell) of Crowell, and the claimed "base portion formed as a unitary member" it is clear that the Examiner's position taking of official notice is insufficient, even if proper, to support the rejection. To even support the official notice sufficiently to read on the claim, the Examiner must take official notice that one of ordinary skill in the art would find a pivotal coupling the same as a unitary member. Any such position is belied by the Examiner's belief that one of ordinary skill in the art is confounded by recitation of "padding material" and would require illustration of padding material to understand the same. Again, Applicant requires evidence, and not the mere allegation, to support the Examiner's dim view of such a level of skill.

Claims 3-8, 10, and 21 depend from claim 1, claims 13-18, 20 and 22 depend from claim 11, and are therefore patentable for at least the same reasons.

Withdrawal of the rejections to claims 1, 3-8, 10, 11, 13-18, and 20-22 is requested.

The rejection of claim 9 and 19 as unpatentable over Crowell in view of Lebaron is traversed. Claim 9 depends from claim 1 and claim 19 depends from claim 11 and each is therefore patentable for at least the same reasons.

Withdrawal of the rejections to claims 9 and 19 is requested.

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CONCLUSION

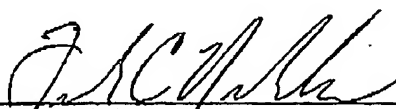
The objections and rejections of claims 1-22 have been obviated by amendments and remarks herein, and Applicant submits that claims 1-22 fully satisfy 35 U.S.C. §101, 102, 103, and 112, and requests this case proceed to issue.

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Respectfully submitted,

Thomas J. Clover

CARDINAL LAW GROUP
Suite 2000
1603 Orrington Avenue
Evanston, Illinois 60201
Phone: (847) 905-7111
Fax: (847) 905-7113



Frank C. Nicholas
Registration No. 33,983
Attorney for Applicant